California State Mediation & Conciliation Service
Case No. 99-1-015

Arbitrator's Case No. 1-31-01

C. ALLEN POOL
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IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

Service Employees International Union Local 535 - and - Alta California Regional Center Sacramento (Involving Discipline, Debbie Heath & Union Representation Rights	ARBITRATOR'S OPINION AND AWARD July 20, 2001

This Arbitration arose pursuant to Agreement between the Service Employees International Union, Local 535, hereinafter referred to as the "Union" and the Alta California Regional Center, hereinafter referred to as the "Employer", under which C. ALLEN POOL was selected to serve as Arbitrator through procedures of the CALIFORNIA STATE MEDIATION AND CONCILIATION SERVICE. The parties agreed that the matter was properly before the Arbitrator and that his decision would be final and binding upon the parties.

The Hearing was held in the Sacramento, California on January 31, February 1, and March 22, 2001 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and arguments. The witnesses were duly sworn and a written transcript was made of the hearing. Posthearing briefs were received in a timely manner, July 2, 2001. The record was then closed.

APPEARANCESS BY COUNSEL

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ISSUES

The parties stipulated that the first issue should be framed as:

Issue No. 1: Whether the Employer violated the Collective Bargaining Agreement by the issuance of the Documented Counseling dated May 3, 2000 to the Grievant, Debbie Reath? If so, what is the appropriate remedy?

The parties deferred framing the second issue until after presentation of their case-in-chief on Issue No. 1. Their hope was that they would be able, at the conclusion of the case in-case concerning Issue No. 1, to reach an agreement concerning Issue No. 2 regarding the unfair labor practice charge filed by the Union with the National Labor Relations Board. Unable to resolve the second issue themselves, the parties submitted the second issue to the Arbitrator on the third hearing day, March 22, 2001. The parties stipulated that the issue would be framed as follows:

Issue No. 2: Whether the Employer violate the Agreement and/or the National Labor Relations Act by its actions on April 20, 2000 in refusing to permit Union Representative Valerie McCan-Murrell to represent members of the bargaining unit subject to interview? If so, what shall be the remedy?

RELEVANT PROVSIONS OF THE AGREEMENT

Section 2,B – No Discrimination:

The Employer agrees not to discriminate against any employee because of membership in the Union, or because of any activities on behalf of the Union.

Section 12, T – Management Rights:

The right to investigate and take action in response to claims of unlawful harassment, threats of violence, or other acts of turpitude, and this right shall include the right to request the employee under investigation to leave the work premises without pay in connection with verbal or physical altercations, threats of violence, or instances in which a confidential investigation of charges is necessary.

Section 29, B – Grievance Procedure:

The parties pledge their active, aggressive and continuing efforts to secure prompt disposition of complaints or disputes. Consequently, every grievance by the Union or an employee shall first be taken up orally by the employee and/or a shop steward with the immediate supervisor, who will attempt to settle the matter. The Union or grievant will clearly identify the discussion as an informal grievance meeting and will identify the contract section under discussion.

Section 26, C – Discipline For Just Cause:

Employees shall not be disciplined except for just cause……. The Employer may take disciplinary action for just cause against any employee, as long as such discipline is progressive in nature and corrective in its scope.

Section 30, – Shop Stewards and Union Officers:

A. Upon reasonable notice to the Employer's Executive Director or designee of the time and date of the requested visit, and subject to consumer care and department requirements, a duly authorized union representative who is not an employee of the Employer shall have access, during reasonable business hours, to the Employer's facilities when such access is necessitated by matter concerning the administration of the Agreement. This privilege shall be exercised reasonably and shall not disrupt the work of employees, and shall not interfere with the Employer's operation or the confidentiality of consumers.

B. The Employer agrees to recognize one (1) Union Steward duly appointed by the Union at each facility operated by the Employer, and additional stewards similarly appointed by the Union for the Sacramento facility. Union duties do not relieve Union Stewards or others of their regular responsibilities. Union Stewards shall be allowed reasonable time when necessary to assist employees during grievance conferences or investigations that may lead to discipline. The Union shall notify the Employer of the names of the currently designated.

RELEVANT PROVISIONS FROM THE PERSONNEL POLICY MANUAL

VIII – CONDUCT AND WORK RULES:

To ensure orderly operations and provide the best possible work environment, ACRA expects all employees to follow rules of conduct that will protect the interest and safety of all employees of ACRA. It is not possible to list all the forms of behavior that are considered unacceptable in the work place, but the following are examples of infractions of rules of conduct that may result in disciplinary action, including suspension or termination of employment.

A. Breaches of Conduct/Behavior – e.g.
   - #2 Insubordination, rude or disrespectful conduct;
   - #6 Boisterous or disruptive activity, fighting, or threatening violence;

BACKGROUND

ISSUE NO. 1

The Employer is a non-profit corporation under contract with the State of California and charged with providing case management services to developmentally disabled people within a defined geographical, management area. The developmentally disabled include individuals with Down's syndrome, autism, and various levels of retardation. The Employer does not operate an in-patient facility. It is an organization of social and health care professionals who do case management for the developmentally disabled by ensuring that they have access to the appropriate resources, living facilities, health care facilities, etc.

The events leading to this arbitration began in late March or early April of 2000 when Nursing Supervisor Peggy Ann Feldt issued an e-mail announcing a change in the daily schedule which also impacted Compensatory Overtime (CTO). Supervisor Feldt, an employee at the facility since September 1, 1996, had recently been promoted to the position of Nursing Supervisor on March 16, 2000.

Two Nursing Consultants, Marcella Berk and Peggy Bragg, working under Ms. Feldt's supervision, had some concerns about the coming schedule change announced by Ms. Feldt namely its affect on the daily schedule and its impact on their Compensatory Overtime. Ms. Berk and Ms. Bragg took their concerns to the Grievant, Debbie Reath. In addition to being a ten-year employee and a Service Coordinator for Case Management in the Placement Department, the Grievant, Debbie Reath, was the Union's designated Shop Steward at the facility. She had also been active in the Union's original organizing drive in 1995 that led to an election in February 1996 and the Union's recognition in March 1996. (The current Collective Bargaining Agreement is the second negotiated Agreement between the Union and the Employer.) The Grievant had, at the time of this dispute, served as a Union official for four years. This included holding the office of Vice-President, Lead Shop Steward, and, for the last three years,

Shop Steward.

The two employees, Ms. Berk and Ms. Bragg asked the Grievant if Supervisor Peggy Ann Feldt could, under the terms of the Collective Bargaining Agreement, make the change in the daily schedule. They also asked the Grievant how the grievance procedure works and how they might initiate a grievance. The Grievant discussed the matter with them and advised them that the Agreement gave them the right to orally discuss their concerns with Supervisor Feldt with the goal of reaching an accommodation.

The Grievant testified that she told them they, as employees and bargaining unit members, could initiate an informal oral discussion with Supervisor Feldt either on their own or they could have a shop steward present to assist them during the discussion. The Grievant pointed out to Ms. Berk and Ms. Bragg that this oral discussion with an immediate supervisor regarding their concerns could be an informal grievance meeting that is the required, first step in the negotiated grievance procedure. The two employees, Ms. Berk and Ms. Bragg, did not initiate any action at this time. Instead, they expressed their desire to think the matter over.

A few days later, Nursing Consultant Berk informed the Grievant that she was ready to approach Supervisor Feldt and discuss her concerns about the schedule. Ms. Berk asked that the Grievant as, shop steward, be present at the discussion. On the afternoon of April 13, 2000 Ms. Berk approached Supervisor Feldt and asked if she could meet with her for a few minutes. Supervisor Feldt responded with a Yes and told Ms. Berk she would, in a few minutes, meet with her in Ms. Berk's office (Tr. 31,54,66). Meanwhile, Ms. Berk called the Grievant to let her know she would be meeting with Supervisor Feldt and asked that she, the Grievant, be present during the discussion.

Supervisor Feldt testified that when she entered Ms. Berk's office for the meeting the Grievant was in the room with Ms. Berk. She testified that on her entry into Ms. Berk's office the Grievant, with whom she was acquainted, identified herself as a Union

Shop Steward. She also informed Supervisor Feldt of the issue (schedule changes and compensatory overtime) and informed her that this was a first level, informal oral meeting as provided for in the Agreement. She also testified that the Grievant conducted herself very professionally (Tr. 33-34).

Supervisor Feldt testified that she felt very uncomfortable, that she was new in her position as a supervisor, and that she "felt the need for an attorney" (Tr. 32). Supervisor Feldt stated that this was her first grievance (Tr. 57-63) and admitted that she had not, at the time, read the grievance procedure in the Agreement (Tr. 51-52). She also testified, on both direct and cross-examination, that Grievant's demeanor was very professional as a shop steward (Tr. 34, 61-62). In addition, she testified that the Grievant explained to her the first step of the grievance procedure, and that if the matter could be worked out, it would stop here (Tr. 56-57).

Supervisor Feldt testified she felt the need for assistance, but that the Grievant did not stop her from calling someone for assistance (Tr. 57). She also said she did not feel personally threatened by the Grievant (Tr. 60-61). Supervisor Feldt testified that she did not complain to her superiors that the Grievant acted inappropriately at the April 13th meeting but that she did tell that her supervisor that she had been caught unawares and "felt blind-sided"(Tr.65). The entire meeting only lasted a few minutes.

On the morning of April 19, 2000, Nursing Consultant Peggy Bragg approached Supervisor Feldt and asked if she could meet with her for a few minutes. Supervisor Feldt said yes and told Ms. Bragg to wait in her office (Tr. 37-38). Supervisor Feldt said she was, at the moment, in the midst of some meetings (Tr. 66). Ms. Bragg then called the Grievant and told her she would be meeting with Supervisor Feldt to discuss the change in schedule and overtime and asked that she, as shop steward, be present to assist in the discussion.

When Supervisor Feldt entered her office a few minutes later, the Grievant was waiting in the room with Ms. Bragg. Supervisor Feldt testified that as she entered her

office she walked past the Grievant and around to the area behind her desk and saying to the Grievant as she walked "I have no time for this", "I can't do this now". She testified that the Grievant then stepped up to the corner of her desk and announced she was here in her role as shop steward (Tr. 39). Supervisor Feldt testified that the Grievant then commenced to read from a card that this was a first-level, informal meeting about the compensatory overtime. She also testified that she understood the right of an employee to have a shop steward assist with a grievance presentation (Tr. 48).

Supervisor Feldt testified that she was very emotional at the time and felt she had again been "blind-sided". The evidence record reflected that Supervisor Feldt broke into tears at one point for a moment or so during this meeting but quickly regained her composure. She testified that tears come easily to her during certain TV shows where she gets very emotional and when she gets upset or angry (Tr. 44).

Supervisor Feldt testified that she ended the meeting by stepping around the Grievant and walked to the door of her office. (The office was very small and the configuration of the furniture made for narrow passageways (Ux-3). She stood by the door and the Grievant and Ms. Bragg exited her office (Tr. 72-79). According to Supervisor Feldt, on cross-examination, the entire meeting lasted only about 5 minutes and that following the meeting she was able to make her other appointments and obligations and finish her work for the day (Tr. 44, 82).

What followed on that same day, April 19th, as reflected by the record, provided some insight as to the Employer's reasons for and the Employer's disciplinary actions taken against the Grievant. About fifteen minutes after the meeting on April 19th, Supervisor Feldt mentioned to Jim Prudhomme, one of her supervisors and a member of the Executive Management Team (EMT), what had just occurred (Tr. 45). Mr. Prudhomme told her to write it up. Ms. Feldt wrote up the incident in the form of an e-mail and sent it to Dr. Candice Adams, Director of Intake and Clinical Services and also a

member of the Executive Management Team (EMT). A copy of the e-mail was also forwarded to the Human Resources Manager, Katrina Meek. The e-mail was dated April 19, 2001 and the recorded time was 12:33 p.m. (Ex-1).

The Chief Executive Officer of the Center, James F. Huyck, was on vacation that day, April 19th. However, Mr. Huyck testified that he learned of the incident on the same day, April 19th, when someone on the Executive Management Team telephoned him and relayed the allegations made by Supervisor Feldt in her e-mail message (Ex.-1, Ex-6, Tr. 193-194). Katrina Meek, the Human Resources Manager, testified that she received instructions from Mr. Huyck directing her to conduct an investigation and to prepare a letter to be given to the Grievant informing her of Supervisor Feldt's allegations (Tr. 96-99). His instructions to Ms. Meek also included serving the Grievant with a notice she was being placed on an investigatory suspension, without pay, pending the outcome of the investigation (Tr. 96, 194-195).

Human Resource Manager Katrina Meek testified that at the time she served the Grievant with the investigatory suspension notice, she had talked with no one except Mr. Huyck (Tx p. 96-99). Ms. Meek also testified that the placement of the Grievant on investigatory suspension was based upon the allegations made by Supervisor Feldt in her e-mail message to Dr. Adams (Tr. 99).

Mr. Huyck testified that although he had discussed the matter with other members of the EMT, the decision was solely his to conduct an investigation and to put the Grievant on investigatory suspension without pay. (Tr. 194-195). He testified that his concerns were that two verbal altercations had occurred without scheduled appointments, that something was going on, and that they could do a better investigation if (the Grievant) was on administrative leave (Tr. 195). (The employer relied on Section 12(T) of the Agreement as the basis for placing the Grievant on administrative leave.)

Mr. Huyck also made it clear that his biggest concern was that the April 19th meeting should have been a scheduled appointment (Tr. 198-199, Ex-6). Ms. Meek,

Human Resources Director, testified that it was important that the Grievant be off the premises so we could conduct an investigation without disruption or interruption (Tr. 102). Dr. Candice Adams testified that the Executive Management Team decided that an investigatory suspension was an appropriate action based on the data they had at the time (Tr. 178-179).

Ms. Meek notified the Grievant that she was to meet with the Executive Management Team (EMT) that afternoon, April 19th, at 4:00 p.m. The meeting with the EMT took place at about 4:20 p.m. Union President and employee, Melissa Littrall, accompanied the Grievant to the meeting. At the meeting, the Grievant was informed of the allegations and that she was being placed on an investigatory suspension without pay pending the outcome of the investigation. The Notice, in part; stated:

> "You have been placed on suspension pending our investigation under Collective Bargaining Agreement Section 12 T. Based upon the outcome of the investigation, you may be subject to disciplinary action up to and including termination. Should the results of the investigation determine that you innocent of these allegations, you will be paid for the time you were off on this suspension." (Jx-2)

She was also given a set of questions to take home and answer. The Grievant was directed to return the questions and answers before the end of the workday on Friday, April 21st in an envelope addressed to Dr. Candace Adams.

Sometime later, the Grievant was directed to meet with HR Manager Katrina Meek and Dr. Candice Adams at 12:15 p.m. on April 25th at the Clarion Hotel. At the meeting, the Grievant was told to report back to work on April 26th. She was, however, not told what her employment status would be on returning to work. The Grievant did not return to work on April 26th. On the advice of her physician she took some days off to cope with the stress. She returned to work on May 13th and the days off, from April 26th to May 13th, were treated as sick leave.

Following their investigation, the Executive Management Team decided the

Grievant would be given back pay for the four days she was on the investigatory suspension. The Team also decided that the Grievant would be given a Documented Counseling/Evaluation of Performance (Jx. 7, Tr. 196). Two charges were cited: (1) Disrespectful Conduct and (2) Disruptive Activity. Dr. Adams testified that the Documented Counseling of May 3, 2000 was the only discipline imposed on the Grievant. A grievance was filed and was processed to this arbitration.

POSITION OF THE EMPLOYER

The Employer had just cause to issue the Grievant the Documented Counseling. The April 13th or the April 19th meetings were not scheduled in advance. Her behavior towards Supervisor Feldt was disrespectful and disruptive. The Grievant disregarded Supervisor Feldt's requests for assistance from others. She disregarded Ms. Feldt's requests to reschedule the meetings at some mutually agreeable later dates. She demanded that the meetings continue after Supervisor Feldt said she did not have the time to meet at that moment. She disrupted Ms. Feldt's appointments and obligations and schedule on April 19th.

Both meetings were essentially ambushes by the Grievant. Her behavior was disrespectful and disruptive if not openly insubordinate and a clear violation of ACRC Personnel Manual Section 8, Conduct and Work Rules. All employees are held to the same standard even if acting in the role of steward. The Employer not only had just cause to issue the Documented Counseling but also would have been justified in issuing a more severe punishment had it decided to do so. The grievance should be denied.

POSITION OF THE UNION

The Employer did not have just cause to issue the Grievant the Documented Counseling. The Employer violated the Collective Bargaining Agreement and federal law when it issued the Grievant the Documented Counseling and the related earlier action of suspending her without pay pending the outcome of an investigation. The Grievant

was just doing her job of representing bargaining unit members and calling the Employer's attention to a claim that the Agreement was being violated. Under the "Equity Principle", an employee when engaging management in grievance proceedings has parity with the Employer. The employee's speech and conduct when functioning in that role are protected activities so long as they do not cross the line between protected and unprotected activities. The Grievant's behavior during the two interactions was never outside the zone of protected speech and conduct. She was simply doing her job as shop steward. The Employer should be ordered to cease and desist from interfering, restraining or coercing unit members by disciplining or threatening to discipline union stewards engaged in their lawful functions. The grievance should be sustained.

DISCUSSION

The Employer's primary argument was that any employee, even if acting in the role of union steward, is subject to discipline for infraction of the work rules as noted in ACRC Section VIII, Conduct and Work Rules. The Grievant in this instance was charged with and disciplined for disrespectful and disruptive behavior in the April 13th and the April 19th meetings with Supervisor Feldt. The Employer acknowledged that the Grievant, at the time of the interactions on April 13th and April 19th, was acting in her role as union steward (Jx-2, Jx-5, Jx-7, Jx-6, and Ux-1). The Employer's Executive Director, Jim Huyck, stated the Employer's position very clearly in his Third Level Response to the Grievant:

"However, you were counseled (disciplined) for clearly disrespectful and disruptive conduct prohibited to all employees. This consequence would have applied to any other employee and even supervisors, if their behavior was similar in any meeting being held for any purpose. All employees are held to the Breaches of Conduct/Behavior, as noted in paragraph one and sub-points 2 and 6 of the ACRC Personnel Policy Manual, Section VIII-A page 53, at all times. This is expected

regardless of the activity an employee is engaged in at the time or with whom they are interacting" (Ex-6, p. 3).

The Employer is mistaken or perhaps unaware that the Union representatives, and this includes employees functioning as union stewards, have a protected status bestowed on them when acting at the negotiating table and in engaging management in the grievance process. When engaging management in a grievance, the union steward, has parity with the management official. Parity means that in the interactions on April 13th and April 19th, the Grievant was an equal with Supervisor Feldt. There was no Master/Servant or Superior/Subordinate status there. They were equals.

Established law has made it clear that an employee representative's speech and conduct, when functioning in the role of union steward, are protected activities. [1] This does not mean that a union steward cannot be disciplined. It means that the standard is much higher. The standard to apply when assessing whether the union representative has crossed the line between protected and unprotected activity was adopted and articulated by the National Labor Relations Board in the case of Dreis and Krump Manufacturing, Inc. (1975) 221 NLRB 309:

"*The Board standard*, appropriately recognizing that the economic power of the employer and employee literally in each case are not equal, that tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required, *has held that offensive, vulgar, defamatory or inappropriate remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service"* (Emphasis added).

Turning to the two meetings, the Employer argued that there was just cause to discipline the Grievant: She attempted to conduct two first level grievance meetings

[1] See Bettcher Manufacturing Corporation (1948) 76 NLRB 526, 527 and Hawaiian Hauling Service, Limited (1975) 219 NLRB 765)

without scheduling them in advance. She refused to honor Supervisor Feldt's request to reschedule the meetings. She refused Supervisor Feldt's request for assistance. She entered Supervisor Feldt's office without permission on April 19th. She demanded, despite Supervisor Feldt telling her she did not have time for the meeting, that the meeting on April 19th continue.

In analyzing the evidence record, that which was most convincing was the testimony of Supervisor Feldt regarding the interactions on April 13 and April 19. Her testimony did not support the allegations made against the Grievant. Supervisor Feldt was very clear. The Grievant did not request the April 13th meeting. Ms. Berk requested the meeting and Supervisor Feldt agreed to meet with her (Tr. 31, 54). It was the same with the April 19th meeting. The Grievant did not request the meeting. Ms. Bragg requested and Supervisor Feldt agreed to meet with her (Tr. 37-38). In both instances, the Grievant was present at the request of Ms. Berk and Ms. Bragg for the purpose of assisting them in presenting their grievances. This is a right accorded to the employees and the Grievant by the negotiated grievance procedure, Section 29 (B) of the Agreement.

The Employer argued that the Grievant refused Supervisor Feldt's request for assistance. The evidence record did not support this. Supervisor Feldt testified that she felt the need to have someone present at the April 13th meeting but that the Grievant did not block her from calling someone to assist (Tr. 56-57). She also testified that she did not feel personally threatened and that the Grievant conducted herself in a very professional manner (Tr. 61-62).

By her own admission, Supervisor Feldt was uncomfortable at the April 13th meeting. She stated this was her first grievance. She also testified that she had not read

the grievance procedure prior to the April 13th meeting (Tr. 51-52). (There was also nothing in the evidence record to show that she had read the grievance procedure prior to the April 19th meeting.) Supervisor Feldt was obviously unprepared for such a meeting. That, however, should not have prevented her from listening for a few minutes to the Grievant's and Ms. Berk's concerns. It was Supervisor Feldt who made the schedule change in question. If she had taken the time to just listen to their concerns, I doubt the matter would have progressed to this arbitration.

Supervisor Feldt's testimony regarding the April 19th meeting showed that she was again caught unprepared (Tr. 37-39). She did become emotional and she broke into tears at one point. This only lasted for a moment or so before she recovered. She explained that she gets emotional during certain types of movies and when upset (Tr. 44). More importantly, there was nothing in her testimony to show she was threatened by the Grievant in anyway. Supervisor Feldt ended the meeting by walking to the door of her office where she stood as the Grievant and Ms. Bragg exited.

Another allegation by the Employer was that the Grievant, by her actions on April 19th, disrupted Supervisor Feldt's scheduled appointments and commitments that afternoon. The evidence record did not support this. Supervisor Feldt testified that the meeting lasted only a few minutes and that she was able to make her appointments and obligations that afternoon (Tr. 82).

The Employer referred to the interactions on April 13th and April 19th as altercations. The dictionary defines an altercation as "a noisy and angry dispute; a wrangle". The term is also synonymous with the word "Quarrel". The two interactions clearly could not be characterized as altercations and therefore could not be used as a

basis by the Employer to invoke Section 12 (T) of the Agreement and place the Grievant on an investigatory suspension without pay.

The Employer was very assertive in arguing that the two meetings should have been scheduled in advance with the Supervisor. The concern was that since the two meetings were attempts to conduct a level-one grievance meeting, the meetings should have scheduled in advance. Section 29, B of the Grievance Procedure is very specific about some things. It states, in part:

> "every grievance by the Union or an employee shall first be taken up orally by the employee and/or a shop steward with the immediate *supervisor, who will attempt to settle the matter*. The Union or grievant will clearly identify the discussion as an informal grievance meeting and will identify the contract section under discussion." (Emphasis added)

Though the provision is specific as to what the immediate supervisor "will attempt" to do at the meeting and what is required of the "Union or grievant" at the meeting, the provision is silent as to how the oral discussion, the first step in a grievance, is to be initiated. Therefore, since there was no contractual requirement to formally schedule either of the meetings in advance, there was no violation of the provision by the Grievant.

For the reasons discussed above, it is the decision of the Arbitrator that the Employer did not have cause to issue the Grievant the Documented Counseling. Nor did the Employer have cause to place the Grievant on suspension without pay pending the results of an investigation. The evidence record did not support the charges. Moreover, the Grievant's conduct in the two meetings may have been disrespectful and disruptive in the opinion of the Employer but, even if true, would not be cause for discipline. The

Grievant was just doing her job as a shop steward and her behavior in no way crossed the line between protected and unprotected activities.

The Employer, by its actions, violated Section 2 (B) and Section 12 (T) of the Collective Bargaining Agreement. The Grievant was discriminated against her because of her activities on behalf of the Union. She was just doing her job as union steward. The grievance is sustained.

AWARD

The grievance is sustained. The Employer violated the Collective Bargaining Agreement by the issuance of the Documented Counseling dated May 3, 2000 to the Grievant, Debbie Reath.

THE REMEDY

The Employer is hereby ordered to cease and desist from interfering, restraining or coercing employees of the unit by disciplining, or threatening to discipline Union stewards engaged in the lawful performance of their function. Additionally, the Employer is ordered to rescind, and remove from any files it maintains, all references to any alleged improper or inappropriate behavior or conduct, or violation by Debbie Reath of the rules of the Employer in connection with the events of April 13 and/or April 19, 2000.

BACKGROUND

ISSUE NO. 2

In addition to the grievance regarding the Documented Counseling given to the Grievant, the Union filed an Unfair Labor Practice with the National Labor Relations Board. The Union charged the employer with violating the National Labor Relations Act, when, "on April 20th, the Employer refused to allow the charging party's agent to represent members" (Jx-8). The Regional Director of the National Labor Relations Board (NLRB), referred the matter back to the parties for resolution through arbitration. The Regional Director also instructed that the Arbitrator send a copy of the arbitration Award/Opinion to the NLRB at the same time it is provided to the parties (Jx-9).

The parties agreed to frame the issue as follows:

Whether the employer violated the agreement and/or the NLRA by its actions on April 20th, 2000 in refusing to permit union representative, Valerie McCan-Murrell, to represent members of the unit subject to interview? If so, what shall be the remedy?

On the morning of April 20th, the Employer, as part of its investigation into the incidents of April 13th and April 19th, scheduled interviews for four employees: Marcella Berk, Peggy Bragg, Michelle Rowland, and Susan Bates. Ms. Berk and Ms. Bragg were directed to report for an interview in the Executive Suite area the morning of April 20th. Ms. Rowland and Ms. Bates were directed to report that afternoon for interviews at 1:00 p.m. and 3:00 p.m. respectively.

On the evening of April 19th, following the Grievant's investigatory suspension, Union President Marsha Littrell finally made telephone contract with the Union's Field Representative, Valerie McCan-Murrell, and informed her of the Grievant's investigatory suspension that afternoon. Early the next morning, Ms. McCan-Murrell telephoned Len Peavy, Director of Adolescent and Adult Service. Director Peavy, along with other members of the Executive Management Team, Director Joanne Tremelling and Dr. Candace Adams, were acting for the facility's Executive Director, Mr. Huyck, who was

on vacation. Ms. McCan-Murrell requested to meet with Director Peavy regarding the Grievant's suspension. Director Peavy told her that the matter regarding the Grievant was a "confidential personnel matter" and would not discuss it with her. He suggested she call Human Resource Manager, Katrina Meek.

Ms. McCan-Murrell called Human Resource Manager Katrina Meek and requested a meeting with the Executive Management Team. HR Manager Meek called her back later informing her that she had reserved Conference Room B from 12:30 p.m. to 2:30 p.m. where Ms. McCan-Murrell could meet with employees. (Conference Room B is located in the Executive Suite area of the facility.) At this time, Ms. McCan-Murrell was not yet aware that the four employees mentioned above, had been directed to report to the Executive Suite conference room for interviews.

Union President Littrell first learned of the scheduled interviews early on the morning of April 20th when the four employees called her requesting that she arrange union representation for them at their interviews. Ms. Littrell arranged for Employee and Shop Steward, Jim Acosta, to be with Ms. Berk and Ms. Bragg at their interviews that morning. Ms. Littrell arranged for another Shop Steward, Mary Brow, to be with Ms. Rowland at her 1:00 p.m. interview and with Ms. Bates at her 3:00 p.m. interview.

When Field Representative McCan-Murrell arrived at noontime on April 20th, she did not go to the conference room that had been reserved for her. She went to the park across the street from the facility where the Union's Executive Board was holding a meeting regarding the recent events. A problem emerged at this time when Shop Steward Mary Brow, because of a conflicting appointment, let Union President Littrell know she would not be able to represent Ms. Rowland and Ms. Bates at their interviews that afternoon. Ms. Littrell contacted Ms. Rowland and Ms. Bates. Since Field Representative Valerie McCan-Murrell was available it was agreed that she would serve as the union representative for Ms. Rowland and Ms. Bates during their interviews. What followed were the interactions between the Director Peavy, Director Tremelling, HR

Manager Meek and Field Representative McCan-Murrell that led to the Union filing an Unfair Labor Practice charge against the Employer.

After entering the facility, Ms. McCan-Murrell, President Littrell, and Ms. Rowland passed through a locked door into the Executive Suite Area. Passage through the locked door was achieved by entering a numerical code in a device at the door. (As employees of the facility, President Littrell and Ms. Rowland knew the numerical code.) They proceeded to the doorway leading to the executive conference room where the interviews were to be conducted. Director Peavy met them at the doorway where he was introduced to Ms. McCan-Murrell for the first time.

Ms. McCan-Murrell identified herself to Director Peavy as an agent of the Union and informed him that she was here to be with Ms. Rowland during her interview. Director Peavy, standing in the doorway, told Ms. McCan-Murrell she would not be allowed entry and would not be allowed to be in the interview room with Ms. Rowland and told her to leave the building. Ms. McCan-Murrell insisted that she had a right, under the terms of the Collective Bargaining Agreement, to be present with Ms. Rowland during the interview.

Director Peavy told her that Ms. Rowland was not a subject of an investigation and therefore had no right to have a Union official present during the interview. He qualified that by telling her that as a matter of courtesy Ms. Rowland would be allowed to have any employee of her choice, including a shop steward, to be present with her during the interview. However, he made it clear that the choice did not include her, the Union's Field Representative.

Needless to say, the decibel level during the exchange was higher than that of a normal conversation. Ms. McCan-Murrell told him that she would return at 3:00 p.m. to be with Ms. Bates during her interview. Ms. Rowland went forward with her interview after arrangements were made for Union Vice-President and steward, Jim Acosta, to be with her during the interview.

At 3:00 p.m., Ms. McCan-Murrell returned with Nursing Consultant Susan Bates and insisted on her right to be present during the interview. Again, Director Peavy stood in the doorway and denied her entry and denied her request to be present during the interview. Ms. McCan-Murrell was told again that as a courtesy, Ms. Bates could have any employee, including a shop steward, with her during the interview but that she, Ms. McCan-Murrell, would not be allowed to be present during the interview. Director Peavy and HR Manager Meek both testified that since the employees were not subjects of an investigation there was no right to have a union representative with them during the interviews.

Words were again exchanged with the decibel level considerably higher than their first confrontation. Manager Meek came out the conference room and Director Joanne Tremelling came out her office and stood behind and to the side of Director Peavy. Ms. McCan-Murrell was told to leave. When she insisted on her right to be present and would not leave, she was told the police would be called. She again refused to leave and Director Tremelling signaled a secretary to call the police. A minute or so later, Ms. Bates and Ms. McCan-Murrell exited the building.

Director Peavy and HR Manager Meek followed them out of the building where Manager Meek told Ms. Bates she could have anyone else she wanted to be with her at the interview as long as it was an employee (Tr. 567). Ms. Bates' interview was rescheduled for the next day and Shop Steward Mary Brow was with her during the interview. The Union filed an unfair labor practice with the NLRB with the Regional Director referring the issue back to the parties wherein the matter proceeded to this arbitration.

POSITION OF THE UNION

The Employer violated the Collective Bargaining Agreement and the National Labor Relations Act when the designated union representative was denied the right to represent members of the bargaining unit who were directed to report for interviews on

April 20th, 2000. Section 30 (A) states that a non-employee union representative shall have access to the Employer's facilities if access is necessitated by matters concerning administration of the agreement.

The Employer violated Section 7 and Section 8 (a)(1) of the NLRA. The four employees sought representational help and had a right to have union representation with them during the interviews. It is also the Union's right to select its own collective bargaining representatives. The Employer did not have the right to dictate or determine who the union representative would be.

The Arbitrator should sustain the grievance and find that the Employer violated both the Agreement and NLRA. As a remedy, the Employer should be ordered to cease and desist from such violations and to post appropriate notices for at least sixty days in the customary work place locations for the information of employees for the information of the employees advising employees of the results of this arbitration.

POSITION OF THE EMPLOYER

The employer did not violate the Collective Bargaining Agreement or the National Labor Relations Act by it actions on April 20, 2001 in refusing to permit Union Representative Valerie McCan-Murrell to represent the employees scheduled to be interviewed that day. The Employer was not required under the Agreement to permit a union representation to be present during the interviews. The Agreement has no language granting that right to an employee where the employee who is not the subject of an investigation. As a courtesy, though, the employees were allowed to have shop stewards present during their interviews. The Employer met its obligation under the Agreement by providing Field Representative Valerie McCan-Murrell with a conference room where she could meet with employees.

Where an employee is specifically told that he/she is not the subject of an investigation and not subject to any discipline, the NLRA does not require that a union representative be permitted to be present during the interview. Also, the Weingarten case

established that an employer must allow an employee to be represented by the employee's union during an interview only when the employee reasonably believes the interview could lead to disciplinary action. See NLRB v. J. Weingarten. 420 U.S. 251 (1975). Since the employees were told by the Employer that they were not the subject of an investigation and not subject to any discipline, the Weingarten rule does not apply. Moreover, under Weingarten, an employee who is merely being interviewed without some reasonable expectation that the investigation could lead to discipline has no right of representation. The Grievance should be denied.

DISCUSSION.

Before discussing the issue, a few comments about the Weingarten rule and Section 30 (A) Union and Shop Stewards found in Agreement may be instructive. It is well established that the Weingarten rule gives an employee the right to request union representation as a condition of participation in an interview. However, the right is limited to situations where the employee reasonably believes the investigation might result in disciplinary action. The Court upheld the NLRB's determination put forth in *Quality*:

> "We would not apply the rule to such run-of-the-mill shop floor conversations as, for example, the giving of instruction or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." (195 N.L.R.B., at 199)

The Court also recognized the standard set forth by the NLRB for determining a reasonable basis. The NLRB stated in *Quality*:

> " 'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." (195 N.L.R.R. 197, 198 n. 3.)

The reasonable ground standard makes it clear that what triggers the right of representation is whether the circumstances of the case establish any reasonable basis for

the employee to believe that the interview might result in discipline. It also means that it matters not that the Employer tells the employee no discipline will follow. If the circumstances are there and provide a reasonable basis, it is not the employer but the employee who effectuates the application of the Weingarten rule. In other words, at the point the employee makes his/her wish for representation known the Employer must respect that wish.

The question here is whether the scheduled interviews, in the instant case, were *"run-of-the-mill shop floor conversations*" (Emphasis added). The answer is no! The scheduled interviews were not scheduled for the purpose of giving instructions or training or needed corrections of work techniques or anything similar. The interviews the affected employees were directed to report to were part of the Employer's investigation into the events that occurred the day before where an employee/steward was put on suspension. In addition, the manner in which the Employer initiated the interviews contributed to the confusion and angst of the employees. They were simply directed to report and they were not told why.

That there was an element of fear on the part of the affected employees was evident. The staff was experiencing some real anxieties as a result of the prior day's events. Nursing Consultant Rowland, for example, testified that when she got the call directing her to report to the Executive Suite area at a certain time, she was concerned. She testified, "I was scared out of my mind. I had no idea what it was about. I wasn't sure if I had inadvertently done something that put me in trouble" (Tr. 456). She also testified that when she asked the caller what this regarded, the caller told her "I'm not at liberty to say." I just needed to be there. She expressed her concerns to a co-worker who told her she needed to have someone go with her. The anxiety experienced by Ms. Rowland at the time was real.

After analyzing all the circumstances in this case, my conclusion is that "reasonable ground" did exist for the employees to fear the possibility of some adverse

impact from the interviews. The interviews were investigatory interviews. They were not run-of-the-mill shop floor conversations. Moreover, it did not matter that the Employer informed them at the start of their interviews they were not the subject of the investigation and not subject to discipline. There was an element of uncertainty and apprehension caused by the events of the previous day as to what the results of the interview may bring to them.

Therefore, when Ms. Rowland and Ms. Bates showed up for their interviews, as directed, accompanied by the union officer of their of their choice, they were expressing their wish for representation. At this point, the Weingarten rule came into play and the Employer should have either respected that right to representation or cancelled the interviews.

Turning to the question of whether the Employer violated the Agreement, the language in Section 30 (A) Shop Steward and Union Officers provided the answer. The negotiated language established the right that "a duly authorized union representative who is not an employee of the Employer shall have access, during reasonable business hours, to the Employer's facilities when such access is necessitated by matters concerning the administration of the Agreement." This right is conditional, but if the conditions are satisfied the right is clear and unambiguous.

The Employer argued that they met the requirements of Section 30 (A) with the act of reserving Conference Room B for her to use to meet with employees between the hours of 12:30 to 2:30 p.m. (Conference Room B was located in the Executive Suite area along with the Executive Suite Conference Room where the interviews were scheduled). The Employer's accommodation, given the circumstances that afternoon, was far too restrictive. More to the point though, the Employer cannot arbitrarily impose unreasonable conditions beyond those expressed in the negotiated language of Section 30 (A).

The Union's Field Representative and designated representative for the interviews

of Ms. Rowland and Ms. Bates, was Valerie McCan-Murrell. She was not an employee at the facility. She was present at the facility in her role as a union officer and she had met the conditions set forth in the language of Section 30 (A) giving her the right of access to the facilities. She gave notice, she appeared during reasonable business hours, and she did not disrupt the Employer's operation or the work of employees. She was also present at the facility because of "matters concerning the administration of the Agreement". On top of that, both Ms. Rowland & Ms. Bates had asked her to represent them. It is the Union's right to select who shall represent unit members not the Employer. The Employer's act of preventing Ms. McCan-Murrell from representing Ms. Rowland and Ms. Bates was both arbitrary and unreasonable.

The Employer argued that Ms. McCan-Murrell caused a disruption. The evidence record did not support this argument. When she made her appearances as the union representative for Ms. Rowland and Ms. Bates, she was exercising the right accorded to her by the NLRA and the Agreement. If the Employer had respected that right, there would have been no confrontations. The Employer precipitated the confrontations by not respecting her legal and contractual right to be there and by ordering her to leave.

I am convinced that if the Employer, in this instance, had abided by its contractual obligations the matter would not have come to this arbitration. More importantly though, the relationship between the parties would not have suffered as it obviously did.

For the reasons discussed in the foregoing, it is the decision of the Arbitrator that the Employer violated Section 30 (A) of the Agreement. The Employer also violated Section 7 and Section 8(a)(1) of the NLRA by its actions on April 20, 2000 in refusing to permit Union Representative Valerie McCan-Murrell to represent members of the

bargaining unit subject to interview. In addition, the Union being the prevailing party in this Arbitration the entire cost of this Arbitration shall be borne by the Employer pursuant to Section 29(I) of the Collective Bargaining Agreement. The grievance is sustained.

AWARD

The Grievance is sustained. The Employer violated the Collective Bargaining Agreement and the National Labor Relations Act by its actions on April 20, 2000 in refusing to permit Union Representative Valerie McCan-Murrell to represent members of the bargaining unit subject to interview.

REMEDY

The Employer is ordered to cease and desist from such violations of the Collective Bargaining Agreement and the National Labor Relations Act. The Employer is also ordered to post notices for at least 60 days in the customary work place locations for the information of the employees advising employees of the results of this Arbitration.

Date: _____ _____

C. ALLEN POOL, Arbitrator